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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LUIS MARTINEZ and CELINA MARTINEZ, as parents and representatives of IVANA MARTINEZ, Plaintiffs/Appellants, v. MJKL ENTERPRISES, LLC, Defendant/Appellee.	2 CA-CV 2007-0166 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-06-343

Honorable Anna M. Montoya-Paez, Judge

AFFIRMED

Law Offices of Mark L. Williams
By Mark L. Williams
Nogales
Attorney for Plaintiffs/Appellants

Knoche & Sorenson
By William C. Knoche
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B R A M M E R, Judge.

¶1 Appellants Luis, Celina, and Ivana Martinez appeal from the trial court's grant of summary judgment in favor of appellee MJKL Enterprises, LLC (MJKL). The Martinezes had filed a negligence action to recover damages for injuries Ivana, a minor, sustained using playground equipment at a restaurant operated by MJKL. Finding no error, we affirm.

Factual and Procedural Background

¶2 On appeal from a summary judgment, we view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *Walk v. Ring*, 202 Ariz. 310, ¶ 3, 44 P.3d 990, 992 (2002). In June 2004, Ivana was injured when her head struck an apparently protruding bolt or screw on a slide she was playing on at a restaurant operated by MJKL. The Martinezes filed this action in June 2006, alleging MJKL had "negligently maintained, managed, controlled, manufactured, installed, and operated" the slide and knew or should have known the protruding bolt or screw "constituted a dangerous condition and unreasonable risk of harm."

¶3 In response to MJKL's interrogatories during discovery, the Martinezes admitted they had not alleged that MJKL or its employees were actually aware the screw or bolt was protruding and could not identify facts to support that assertion. And, in answering MJKL's interrogatory asking the Martinezes whether they "claim the [dangerous] condition . . . existed for a sufficient length of time that MJKL or its employees . . . should have known of that condition," and, if so, what facts they "claim support such [a] contention," the

Martinezes responded only that MJKL should have known of the condition because the slide "had been there for a long time."

¶4 MJKL then moved for summary judgment, arguing there was no evidence it had created, been aware of or should have been aware of, the dangerous condition of the slide. The Martinezes argued in response that MJKL "should have known [of the protruding screw or bolt] based upon the length of time the dangerous condition existed." They also argued MJKL was vicariously liable for the negligent inspection and maintenance of the slide by a contractor who had inspected the slide and other MJKL play equipment approximately one week before Ivana's injury, and had repaired several other pieces of play equipment at the restaurant.[1]

¶5 The trial court granted MJKL's motion for summary judgment, noting the Martinezes had had "sufficient time to conduct discovery" and concluding they "ha[d] produced no facts to support any of the . . . elements for a [premises liability] negligence claim" and indeed had "presented [no facts] to support their claim other than the occurrence

[1]In their complaint, the Martinezes had named several fictitious defendants, alleging MJKL was the principal and/or employer of those defendants and was vicariously liable for their failure to "maintain[], manage[], control[], manufacture[], install[], and operate[]" the slide. MJKL had filed a notice designating as a non-party at fault a contractor who had inspected and performed maintenance of the play equipment approximately one week before Ivana's injury. The Martinezes then moved to amend their complaint to include the contractor as a defendant, but the trial court never ruled on that motion before signing the judgment from which the Martinezes now appeal.

of the injury." It then signed a judgment against the Martinezes for $91 in costs. This appeal followed.

Discussion

¶6 A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves,* 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should only grant a motion for summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.,* 166 Ariz. at 309, 802 P.2d at 1008.

¶7 In an action for injuries caused by a dangerous condition on a business property, the following principles apply:

> [t]he proprietor of a business is not an insurer of the safety of its customers and the mere existence of a dangerous condition existing on a defendant's property is not enough to establish negligence when a plaintiff is injured by that condition. Rather, to prevail on a negligence claim, a plaintiff must prove that the proprietor had notice of the dangerous condition by showing: (1) that the defendant or its agents caused the dangerous condition; or (2) that the defendant had actual knowledge of the existence of the dangerous condition; or (3) "that the condition existed for such a length of time that in the exercise of ordinary

> care the proprietor should have known of it and taken action to remedy it (i.e., constructive notice)."

Haynes v. Syntek Fin. Corp., 184 Ariz. 332, 339, 909 P.2d 399, 406 (App. 1995) (internal citations omitted), *quoting Preuss v. Sambo's of Ariz., Inc.*, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981).

¶8 The Martinezes presented no evidence suggesting how long the bolt or screw Ivana struck may have been exposed. They assert, however, that such evidence was unnecessary to withstand summary judgment. Relying on *Haynes*, the Martinezes argue summary judgment was inappropriate because the nature of the defect alone allows the inference that the bolt or screw had protruded for a sufficient period of time that MJKL should have become aware of it and taken action to remedy it.

¶9 In *Haynes*, the plaintiff fell and broke her leg while walking on a deteriorated sidewalk on the defendant's premises. *Id.* at 334, 909 P.2d at 401. The defendant contended on appeal that the plaintiff had failed to prove it had notice of the deterioration of the sidewalk and, therefore, the court erred by denying its motion for a directed verdict. *Id.* at 339, 909 P.2d at 406. Affirming the trial court's ruling, Division One of this court noted that, not only had witnesses testified about the sidewalk's poor condition, but "the very nature of the deterioration allowed the jury to infer that the condition did not arise suddenly, but instead, over a period of time." *Id.* Division One concluded "'the very nature of a defect such as this, which a jury could find is neither transitory nor one that usually arises suddenly, is enough to support an inference that it had been in existence for sufficient time to put [the

defendant] on notice.'" *Id., quoting Cooley v. Ariz. Pub. Serv. Co.*, 173 Ariz. 2, 3, 839 P.2d 422, 423 (App. 1991) (alteration in *Haynes*).

¶10 The Martinezes argue the protruding bolt or screw that injured Ivana was not transitory but instead was, like the deteriorated sidewalk in *Haynes*, "a condition that occurred slowly over a period of time." Thus, they reason, combined with evidence that the slide had been installed on MJKL's premises for "a long time," a jury could conclude MJKL was or should have been aware of the protruding bolt or screw.

¶11 The Martinezes, however, produced no evidence suggesting that the exposed bolt or screw was a condition that was unlikely to occur suddenly. *See Haynes*, 184 Ariz. at 339, 909 P.2d at 406. For example, they provided no affidavits, expert or otherwise, addressing how the bolt or screw might have become exposed, photographs of the slide, or information about the slide's construction. Indeed, they produced no evidence whatsoever relevant to MJKL's negligence. The Martinezes' statement of facts accompanying their response essentially restated the allegations in their complaint and cited no affidavits or other evidence to support them. *See* Ariz. R. Civ. P. 56(c)(2) (statement of facts "shall refer to the specific portion of the record where the fact may be found"); Ariz. R. Civ. P. 56(e) (party opposing summary judgment "must set forth specific facts showing there is a genuine issue for trial"). The only affidavit the Martinezes referred to in their statement of facts was an affidavit by the Martinezes' counsel stating he had not been notified when MJKL had

removed the slide from its property.[2] There is simply no evidence from which the trier of fact could conclude the dangerous condition had developed over a long period of time. Thus, no fact-finder could properly conclude MJKL had constructive notice of the alleged protruding bolt or screw.

¶12 The Martinezes additionally argue summary judgment was improper because there is a "genuine issue of material fact" whether MJKL was vicariously liable for the negligence of the contractor that had, at MJKL's request, inspected the play equipment at the restaurant approximately one week before Ivana's injury and had found no safety concerns related to the slide. There is no evidence, however, that the bolt or screw that injured Ivana had been exposed or that the slide had been in anything but a safe condition at the time the contractor inspected the play equipment. Because there is no evidence of negligence by the contractor, there is nothing for which MJKL can be vicariously liable. Therefore, for the

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[2]The Martinezes complain that "MJKL removed the slide and did not give [notice] to [them] prior to removal" and have not "offered nor explained where it is." They also note "there were never any discovery cut off dates set." The Martinezes argued in their response to MJKL's motion for summary judgment that they "should be allowed to inspect the play equipment using an expert so that it can be ascertained how long the bolt and/or screw had protruded from the equipment." To the extent this statement may be construed as an application for an order to compel discovery pursuant to Rule 37(a), Ariz. R. Civ. P., or some other pertinent motion, however, it is wholly insufficient and the trial court did not err in not addressing this request. *See* Ariz. R. Civ. P. 7.1 (motions must state grounds for relief "with particularity" and include "precise legal points, statutes and authorities relied on"; trial court may summarily dispose of motion that does not comply with rule). Nor did the Martinezes assert summary judgment was premature or seek to continue summary judgment pursuant to Rule 56(f), Ariz. R. Civ. P. The Martinezes make no cognizable argument on appeal about these concerns and we do not address them further.

reasons stated above, the trial court did not err in granting MJKL's motion for summary judgment.

Disposition

¶13 We affirm the trial court's grant of summary judgment in favor of MJKL and the judgment against the Martinezes.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge